82-1167

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

BRADLEY THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether law enforcement officers must obtain a search warrant before conducting a chemical field test to determine whether a substance that has lawfully come into their possession and that appears to be cocaine is in fact cocaine.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases:—Continued Page

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

UNITED STATES OF AMERICA, PETITIONER

v.

BRADLEY THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 683 F.2d 296.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 11a) was entered on July 27, 1982. A petition for rehearing was denied on October 14, 1982 (App. B, *infra*, 10a). On December 2, 1982, Justice Blackmun extended the time in which to file a petition for a writ of certiorari to and including January 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, respondents were each

convicted of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and conspiring to commit that offense, in violation of 21 U.S.C. 846. Respondent Bradley Jacobsen was also convicted of assaulting a federal officer, in violation of 18 U.S.C. 111 (App. A, *infra*, 3a).[1] The court of appeals reversed all the narcotics convictions on the ground that evidence obtained in violation of the Fourth Amendment was admitted at trial (App. A, *infra*, 8a).[2]

1. On May 1, 1981, an employee of Federal Express, a private freight carrier, discovered a damaged cardboard box among the packages given to Federal Express for shipment (App. A, *infra*, 1a). Pursuant to a written company policy adopted "because of the possibility of insurance claims" (App. E, *infra*, 17a), a Federal Express supervisor opened the package. Inside the package was a ten-inch-long tube wrapped with gray tape; inside the tube were four transparent plastic bags, one inside the other. The employees removed the bags from the tube and saw that the innermost bag contained a white powder. App. A, *infra*, 1a; App. E, *infra*, 17a.

The Federal Express employees believed the white powder might be an illicit substance, and they notified the Drug Enforcement Administration. They also re-

---

[1] Respondent Bradley Jacobsen was sentenced to a term of one year's imprisonment and three years' special parole on the substantive narcotics count, a consecutive term of six months' imprisonment on the assault count, and a concurrent term of one year's imprisonment on the conspiracy count. Respondent Donna Jacobsen was sentenced to a one-year term of imprisonment and a three-year special parole term on the substantive count, and a concurrent one-year prison term on the conspiracy count, but her sentences were suspended and she was placed on three years' probation on the condition that she serve three months in a jail-type facility. App. A, *infra*, 3a n.1.

[2] The court of appeals affirmed Bradley Jacobsen's assault conviction (App. A, *infra*, 8a).

placed the bags in the tube but left them visible from the end of the tube. DEA agents went to the Federal Express office, removed the bags from the tube, and conducted a chemical field test on a small sample of powder from the plastic bags. The test indicated that the powder was cocaine. App. A, *infra*, 1a-2a; App. E, *infra*, 18a.[3]

The DEA agents then rewrapped the package after extracting another sample for further laboratory testing. The package had been addressed to "Mr. D. Jacobs" at an address that the agents ascertained to be respondents' residence. DEA computer files mentioned respondent Bradley Jacobsen in connection with two previous reports of cocaine distribution. On the basis of that information and what they had learned at the Federal Express office, the agents sought and obtained a warrant to search the house to which the package was addressed. App. A, *infra*, 2a; App. E, *infra*, 18a-19a.

On the afternoon of May 1, DEA Agent Lewis, in ordinary clothes, went to respondents' house and delivered the rewrapped package. Respondent Donna Jacobsen signed for the package and accepted it. Approximately one hour later, Agent Lewis returned to the house with the search warrant and several other officers. Respondent Bradley Jacobsen opened the door, and Agent Lewis identified himself as a law enforcement officer. Bradley Jacobsen then slammed the door into Agent Lewis's face, breaking his glasses and knocking him down, and yelled: "It's the police—flush it." App. A, *infra*, 2a; App. E, *infra*, 19a; Tr. 43.

The officers forced the door open and entered the house. They found traces of cocaine, cocaine paraphernalia, and burned remnants of the package. App. A, *infra*, 2a.

---

[3] The package was later found to contain six and one-half ounces of cocaine, with a street value of over $72,000 (Tr. 441). "Tr." refers to the trial transcript.

2. Respondents unsuccessfully moved to suppress the evidence found in their house. The district court noted that respondents "concede that the initial search of the package and discovery of the cocaine by the Federal Express employees was not proscribed by the fourth amendment because it was done by private persons" (App. D, *infra*, 13a). The district court found that by the time the DEA agents arrived at the Federal Express office, "the Federal Express employees had already opened the box and removed the bags containing the white powder from the gray tube" (*id.* at 15a).

The district court ruled that "when a private person makes an initial search of a closed container and then turns the container over to government authorities, the reopening of the container does not constitute a separate search requiring a warrant" (App. D, *infra*, 14a-15a). In this case, the court noted, "[t]he only investigation of the contents of the box beyond the investigation by Federal Express employees was the field test by the DEA agents" (*id.* at 15a). The district court then rejected as "without foundation" respondents' contention that "when federal agents lawfully receive possession of a substance they believe to be contraband, they must obtain a search warrant before a field test to verify the chemical content of the contraband may be performed" (*ibid.*).

3. The court of appeals held that the district court erred in not suppressing the evidence found in respondents' house. The court of appeals noted that respondents did not contend that the Federal Express employees' inspection of the package violated the Fourth Amendment but only that "the federal agents' search exceeded the scope of the private search" (App. A, *infra*, 4a). The court ruled that "[t]he private search in this case exposed bags of powder, but [respondents'] initial reasonable expectation that the package's con-

tents would remain private was not entirely frustrated by the private search" (*id.* at 6a).

Specifically, the court of appeals held that the agents' field testing of a sample of the powder violated the Fourth Amendment. The court of appeals acknowledged that this holding was in direct conflict with *United States* v. *Barry*, 673 F.2d 912 (6th Cir. 1982), cert. denied, No. 81-6942 (Oct. 12, 1982), which the court below described as presenting "almost identical circumstances" (App. A, *infra*, 6a n.4).[4] The court of appeals relied exclusively on *Walter* v. *United States*, 447 U.S. 649 (1980), in which four Justices of this Court, with a fifth, Justice Marshall, concurring in the judgment, concluded that federal agents violated the Fourth Amendment when they failed to obtain a warrant before viewing, with the aid of a projector, films that private parties had lawfully acquired and delivered to them but had not themselves viewed on a projector. The court of appeals declared that "[t]he invasion of privacy and collection of inculpatory evidence involved in testing unidentified substances is parallel to the investigation and intrusion involved in screening a film" (App. A, *infra*, 7a n.4). It explained (*id.* at 6a):

> The DEA agents' extension of the private search precisely parallels that in *Walter*. In both cases, viewing the objects with unaided vision produced only an inference of criminal activity. In both cases, government agents went beyond the scope of the private search by using mechanical or chemical means to discover the hidden nature of the ob-

---

[4] The court of appeals also acknowledged that its decision was in conflict with *People* v. *Adler*, 50 N.Y.2d 730, 409 N.E.2d 888, 431 N.Y.S.2d 412, cert. denied, 449 U.S. 1014 (1980), and recognized that the Tenth Circuit had upheld a field test in similar circumstances. App. A, *infra*, 6a-7a n.4, citing *United States* v. *Andrews*, 618 F.2d 646, cert. denied, 449 U.S. 824 (1980).

jects. The governmental activity represents a significant extension of the private searches because it revealed the content of the films in *Walter* and, here, the composition of the powder.

The court of appeals therefore concluded that, because none of the recognized exceptions to the warrant requirement applied, the DEA agents violated the Fourth Amendment when they conducted the field test without a warrant. The court then noted that "[t]he finding of cocaine in a package being sent to [respondents'] home was the core of the affidavit which justified the issuance of the warrant to search the * * * home" (App. A, *infra*, 8a), and it asserted that "[w]ithout the statement that a test indicated the presence of cocaine in the powder, the affidavit does not provide probable cause to believe [respondents] possessed cocaine in their home" (*ibid.*).

Senior District Judge Becker, sitting by designation, concurred specially "with serious reservations" (App. A, *infra*, 9a). He indicated that he believed the decision in *Walter* required the result reached by the court of appeals but that he agreed generally with the views expressed by Justice Blackmun's dissent in *Walter*. The government's petition for rehearing was denied, with three judges voting to rehear the case en banc (App. B, *infra*, 10a).

REASONS FOR GRANTING THE PETITION

The court of appeals has plainly erred, and its error will impose substantial and wholly unnecessary burdens on law enforcement efforts. Nothing in the decisions of this Court or in Fourth Amendment principles requires that officers obtain a warrant before conducting a test that can reveal only whether or not a substance is cocaine. Moreover, the court of appeals' decision casts a shadow over the validity of one of the most routine and essential practices in drug law enforcement—a practice that has been heretofore employed on literally thou-

sands of occasions without any judicial suggestion of impropriety until this case. Further review is therefore warranted.

1. A person may "claim the protection of the Fourth Amendment" against a government intrusion only if he has "a legitimate expectation of privacy" that is violated by the intrusion. *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978); see, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968); *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The DEA agents' field test can be said to have invaded respondents' privacy in only one respect: it determined whether the suspicious substance lawfully seen by the agents was cocaine. The field test could not have discovered any other information about respondents; had the test of the powder proved negative for cocaine, it would have revealed no other fact.[5] The field test thus would not have revealed any information whatever about an innocent person.

Respondents undoubtedly would have preferred that the authorities not learn that the substance discovered by the Federal Express employees was cocaine. But that desire "is not 'one that society is prepared to recognize as "reasonable" ' " or legitimate. *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12, quoting *Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J., con-

---

[5] At trial, the agent who conducted the field test described it as "a Scott reagent field test * * * for cocaine" (Tr. 158) and briefly explained its operation. The DEA informs us that this test will reveal only whether or not a substance is cocaine; if it is not cocaine, the test will not reveal its composition. This fact was not brought out at the suppression hearing or the trial, because neither focused on the precise nature of the test, but the court of appeals' opinion did not presuppose that the test revealed more than whether or not a substance is cocaine.

It is, in any event, most unlikely that any lawful substance, the chemical composition of which the owner might legitimately wish to conceal from the authorities, would be shipped in the way respondents' cocaine was shipped.

curring). In no sense were respondents entitled to keep that information from the authorities once the transparent package had come into the latter's lawful possession. Cf. *Roberts* v. *United States*, 445 U.S. 552, 557-558 (1980); *Branzburg* v. *Hayes*, 408 U.S. 665, 695-697 (1972). Since the field test was incapable of disclosing anything except information that respondents could not legitimately be entitled to keep private, they cannot claim that the test violated their Fourth Amendment rights.

Principally for these reasons, *Walter* does not at all support the conclusion that the agents were required to obtain a warrant before conducting the field test. Viewing a film discloses far more information that a person has a legitimate interest in keeping private—even if, as in *Walter*, the contents are described on the container—than conducting a field test to determine whether a pill or powder is an illegal or controlled substance. The viewing of a film, of course, implicates First Amendment values, which played a role in *Walter*. See 447 U.S. at 655 & n.6 (opinion of Stevens, J.); *Roaden* v. *Kentucky*, 413 U.S. 496, 502 (1973), quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 472 (1971) ("The seizure of instruments of a crime, * * * or 'contraband * * *' [is] to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards."). See also *United States* v. *Barry*, *supra*, 673 F.2d at 920. Viewing a film also reveals much about the ideas and attitudes of the person who made it, and about the interests and tastes of the recipient. See *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952). The field test at issue here was incapable of disclosing even remotely comparable information or of invading respondents' privacy to a comparable degree, and the court of appeals' mechanical equation of the

viewing of a film with a field test reflects a failure to consider carefully the varying privacy interests at stake.[6]

---

[6] At some points in its opinion, the court of appeals suggested that the DEA agents violated the Fourth Amendment in other respects in addition to conducting the field test. See, *e.g.*, App. A, *infra*, 8a ("We find that the agents' removal of the plastic bags, the taking of samples, and the chemical analysis of these samples constituted a violation of [respondents'] fourth amendment rights."). But it seems unlikely that the court of appeals considered the agents' actions, other than the field test, to be a violation of the Fourth Amendment, and to the extent it did the court was incorrect.

The Federal Express employees opened the cardboard package and removed the plastic bags from the tube. It is undisputed that federal agents were not implicated in this search. The court of appeals appears to have accepted the principle—seemingly endorsed by a majority of this Court—that to the extent the agents merely repeated the steps taken by the private persons, their actions did not implicate Fourth Amendment interests. See App. A, *infra*, 4a, 5a-6a; *Walter* v. *United States*, *supra*, 447 U.S. at 656, 659 & n.14 (opinion of Stevens, J.); *id.* at 663 (Blackmun, J., dissenting). In any event, when the Federal Express employees gave the package to the DEA agents, the plastic bags were visible from outside the tube (App. A, *infra*, 1a); it is therefore clear that the agents' observation of the transparent plastic bags with a white powder did not invade any Fourth Amendment interest. See *Walter* v. *United States*, *supra*, 447 U.S. at 661 (opinion of White, J.), quoting *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 489.

Having lawfully seen the bags, the agents could not have violated the Fourth Amendment when they opened them and extracted a sample. A transparent bag is surely the best example of a "container[] * * * [that] by [its] very nature cannot support any reasonable expectation of privacy because [its] contents can be inferred from [its] outward appearance" (*Arkansas* v. *Sanders*, 442 U.S. 753, 764-765 n.13 (1979); see *Robbins* v. *California*, 453 U.S. 420, 427 (1981) (plurality opinion); *Blair* v. *United States*, 665 F.2d 500, 506-507 (4th Cir. 1981)). The court of appeals therefore should have concluded, and apparently did

2. The court of appeals acknowledged that its decision conflicts with *United States* v. *Barry*, *supra*,[7] and no other court of appeals that has considered a case in which a field test was conducted has even suggested that such action might require a warrant. Several of these cases involved circumstances closely parallel to those present here, in which a private carrier delivered containers holding a suspicious substance to the authorities. See, *e.g.*, *United States* v. *Jennings*, 653 F.2d 107, 108 (4th Cir. 1981); *United States* v. *Andrews*, 618 F.2d 646 (10th Cir.), cert. denied, 449 U.S. 824 (1980); *United States* v. *Edwards*, 602 F.2d 458 (1st Cir. 1979);

---

conclude, that the agents lawfully came into possession of the substance they tested.

The court of appeals did not appear to suggest that the agents' actions constituted an improper seizure, either because they retained the package for a time or because they destroyed a minute portion of the cocaine when they tested it. In any event, there is no reason to believe that the brief retention of the package interfered with any possessory interest of respondents'. See *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). The destruction or retention of cocaine implicates no protected interest, since respondents' cocaine was contraband that the government is "entitled to * * * possess[]" (*Boyd* v. *United States*, 116 U.S. 616, 623-624 (1886)). Even the destruction or retention of a small amount of an innocent material might well be de minimis; if it were not, it would amount to an invasion of only a (possibly compensable) property interest, not a privacy interest. Moreover, the Fourth Amendment permits seizures upon probable cause even without a warrant (*Payton* v. *New York*, 445 U.S. 573, 587 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977)), and in our view the agents had probable cause to believe that the package contained a controlled substance even before the field test. See page 12 note 9, *infra*.

[7] When we opposed certiorari in *Barry*, we acknowledged the conflict but said that review by this Court was not warranted because the decision in *Barry* was plainly correct and the court of appeals had not yet acted on our petition for rehearing in the present case. See 81-6942 Br. in Opp. 6.

United States v. *Rodriguez*, 596 F.2d 169, 173-175 (6th Cir. 1979); *United States* v. *Crabtree*, 545 F.2d 884 (4th Cir. 1976); *United States* v. *Ford*, 525 F.2d 1308, 1312 (10th Cir. 1975).

3. Field tests are of great importance to the enforcement of the narcotics laws. These tests are conducted very frequently, generally by agents who want to determine quickly and on the scene whether to pursue the investigation of a suspicious substance—whether, for example, to make a controlled delivery, as in this case, or to arrest a person found in possession of the substance.

By requiring these agents to obtain warrants, the court of appeals' approach will, to a large degree, defeat the purpose of the field test. It will become impossible for agents to determine quickly and with certainty whether a suspicious substance is an illegal drug; they will have to operate under conditions of uncertainty for a considerable period while a warrant is obtained. Some investigations will, in all probability, be impeded by the delay, and the delay may also prejudice innocent private parties—if, for example, an agent detains a package (or a person found with a suspicious substance) until he obtains the warrant he needs to conduct the test.[8] See, *e.g.*, *United States* v. *Jennings*, *supra*, 653 F.2d at 111 (airline employee asked DEA to conduct a field test because if substance in package was not determined to be contraband, airline was obligated to send it to addressee on next flight).

---

[8] Of course, if an agent has probable cause, he can, under the court of appeals' ruling, conduct a field test in exigent circumstances. But delay can prejudice an investigation even in circumstances insufficiently exigent to justify a search without a warrant; it is often appropriate to pursue an investigation even in the absence of probable cause; and some agents will, if the court of appeals' ruling stands, feel compelled to obtain a warrant before conducting a field test out of an abundance of caution even if exigent circumstances exist.

Moreover, an agent will often have probable cause to believe that a suspected substance is contraband even without conducting a field test.[9] Instead of waiting for a warrant to be obtained, he may decide simply to proceed with his investigation, which may lead to such relatively more intrusive actions as surveillance, a controlled delivery, a search under exigent circumstances, or an arrest. Under the court of appeals' rule, these costs will be incurred *solely* to protect the interest a possessor of contraband has in concealing the *nature* of the substance from the authorities—an interest that should receive no protection whatever.

Finally, the logic of the court of appeals' ruling applies not just to field tests but to laboratory analyses of lawfully seized samples of suspicious substances. The results of laboratory analyses are routinely introduced into evidence in drug prosecutions. If the court of appeals' approach were to prevail, law enforcement authorities would be forced in most instances to obtain a warrant before conducting a laboratory test, and as a result literally thousands of additional warrants would be sought annually. This massive burden—to protect

[9] We believe that the agents here had ample probable cause to believe that the plastic bags contained cocaine even before they conducted the field test. The court of appeals' contrary ruling (App. A, *infra*, 8a), is surely implausible; it is most unlikely that any legal white powdered substance would be shipped in the way respondents' cocaine was packaged. Moreover, a holding that there was no probable cause to believe that the powder was cocaine appears to lead to the conclusion that the agents were helpless to do anything to interdict the shipment of cocaine or to apprehend respondents, since presumably without probable cause they could not even obtain the warrant that the court held was needed for the field test. See page 11 note 8, *supra*.

Because the agents had probable cause independent of the field test, the evidence they obtained in the search of respondents' house (pursuant to the warrant) was not "tainted" by the field test, and the court of appeals erred in ordering its suppression.

an interest that, so far as we are aware, no other court has ever thought to require the protection of the Warrant Clause—is plainly unjustified.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

JANUARY 1983

APPENDIX A

UNITED STATES OF AMERICA, APPELLEE,

v.

BRADLEY THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN, APPELLANTS.

No. 81-2158.

United States Court of Appeals,
Eighth Circuit.

Submitted May 20, 1982.
Decided July 27, 1982.

Before LAY, Chief Judge, HEANEY, Circuit Judge, and BECKER* Senior District Judge.

LAY, Chief Judge.

The fundamental issue in this appeal is whether federal drug agents' warrantless search of a package damaged in transit and inspected by employees of a private carrier was a violation of the warrant clause of the fourth amendment. We find the search unconstitutional.

The facts may be briefly stated. A supervisor for Federal Express, a private freight carrier, discovered a damaged package. Pursuant to company policy, a manager examined the contents of the package. The package consisted of a cardboard box wrapped in brown paper. Inside the box was a tube of duct tape. Inside the tube were four clear plastic bags, one inside the next, the innermost containing white powder. Federal Express employees, thinking the powder might be a controlled substance, notified the Drug Enforcement Agency. The manager then placed the bags back in the tube, leaving them visible from the tube's end, and placed the tube back in the box.

---

* William H. Becker, Senior District Judge, Western District of Missouri, sitting by designation.

When DEA Agent Jerry Kramer arrived, the manager gave him the box. Kramer removed the tube from the open box, took the bags out of the tube, and extracted a sample of the powder. He thereafter conducted a field test on the powder which indicated the powder was cocaine. A short time later another sample was removed for further testing. The package was then rewrapped and Federal Express was directed to deliver the package to the addressee shown on the label. The package was addressed to Mr. D. Jacobs, 7300 West 130th Street, Apple Valley, Minnesota.

Drug enforcement agents determined Bradley Jacobsen lived at this address. He was mentioned in at least two previous DEA investigative files relating to cocaine distribution. On the basis of this information and the field testing, the drug enforcement agents obtained a warrant from a magistrate to search the defendant's home.

During the afternoon of May 1, 1981, DEA Agent James Lewis went to the Jacobsen home with the package. Dressed in ordinary street clothes, Lewis delivered the package to Donna Jacobsen, Bradley's wife. Lewis returned to the home approximately one hour later with eight to ten other officers. When Lewis identified himself, Bradley Jacobsen slammed the door, knocking Lewis down, and yelled, "It's the police—flush it." The officers forced the door open and searched the house. Cocaine traces, cocaine paraphernalia, and burned remnants of the package were found. The Jacobsens were arrested.

Defendants moved to suppress the evidence seized in their home as fruit of an illegal search of the package. Magistrate Floyd E. Boline recommended the motion be denied because the government's search did not exceed the scope of the private search. Over defendants' objection, the district court, Judge Harry H.

MacLaughlin presiding, refused to suppress the evidence.

Bradley and Donna Jacobsen were tried before a jury and convicted on one count of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. Bradley Jacobsen was also convicted of assault on a federal officer in violation of 18 U.S.C. § 111. This appeal followed entry of judgment.

We find that the evidence should have been suppressed and thus reverse the defendants' convictions for possession with intent to distribute cocaine and for conspiracy. We find the evidence sufficient to sustain a finding that Bradley Jacobsen assaulted a federal officer and thus sustain his conviction on that count.[1]

Since *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877 (1877), it has been the law that letters and sealed packages are protected from government inspection. The Jacobsens had a reasonable expectation that the contents of the package would remain private. *See Walter v. United States*, 447 U.S. 649, 651-52, 654, 100 S.Ct. 2395, 2398-99, 65 L.Ed.2d 410 (1980) (material carried by private carrier); *United States v. Van Leeuwen*, 397 U.S. 249, 251-52, 90 S.Ct. 1029, 1031-32, 25 L.Ed.2d

---

[1] Bradley Jacobsen was sentenced to the custody of the Attorney General for 12 months on count I, plus a three-year special parole term; six months on count II, consecutive to the sentence on count I; and 12 months on count III, concurrent with the sentences for counts I and II. Donna Jacobsen was sentenced to the custody of the Attorney General for 12 months on count I, plus a special parole term of three years. She was also sentenced to a term of 12 months on count III, concurrent with the sentence on count I. Both of these sentences were suspended and she was placed on three years probation on condition that she serve a period of three months in a jail-type facility.

282 (1970). *Contra United States v. Barry*, 673 F.2d 912 (6th Cir. 1982) (Edwards, C. J., dissenting).[2]

The government argues that the fourth amendment does not forbid evidentiary use of the fruits of a private search conducted without government participation or encouragement. *Coolidge v. New Hampshire*, 403 U.S. 443, 487-90, 91 S.Ct. 2022, 2048-50, 29 L.Ed.2d 564 (1971); *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921). Defendants do not argue that the Federal Express employees opened the package pursuant to any form of government directive. They assert, however, that the federal agents' search exceeded the scope of the private search.

In *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 210 (1980), a private carrier delivered a number of sealed packages to the wrong company. Employees of the company opened the packages and found boxes of film. The boxes contained suggestive drawings and explicit descriptions of the films' contents. An employee of the private carrier removed a reel of film and attempted to view it by holding it against a light, but he could not see its contents and no

---

[2] The government does not contest the standing of either Bradley or Donna Jacobsen to challenge the search of the package. The sender and intended recipient of a package clearly have "an adequate possessory or proprietary interest in the ... object searched" to give them standing to question the propriety of its search or seizure. *See United States v. Haes*, 551 F.2d 767, 769-70 (8th Cir. 1977) (quoting *United States v. Kelly*, 529 F.2d 1365, 1369 (8th Cir. 1976)).

The package was addressed to Mr. D. Jacobs (the magistrate's report omits the "Mr." but the search warrant affidavit includes it). Mr. Jacobsen's first name is Bradley and Mrs. Jacobsen's first name is Donna. Given this ambiguity as to who the package was addressed to and the fact that it was sent to the address at which the Jacobsens were living as husband and wife, we conclude that both Jacobsens have standing to challenge the search.

attempt was made to project the film. The employees contacted the FBI. Without obtaining a warrant, FBI agents took possession of the packages and screened the films.

The Court, in a five to four decision,[3] found the agents' actions violated the fourth amendment. The plurality held that the agents were lawfully in possession of the films, but should have obtained a warrant authorizing them to view the films. The screening of the films was an investigation which yielded incriminating evidence not disclosed on the films' containers. The viewing was deemed a search. *Id.* at 653-54, 100 S.Ct. at 2399-2400.

In *Walter*, the private search exposed the boxes to government scrutiny. The plurality held, however, that government scrutiny must be strictly confined to what is exposed by the private search. *Id.* at 656-57, 100 S.Ct. at 2401-02 (comparing limitation to that imposed by terms of warrant). Justice Stevens concluded:

> Prior to the Government screening, one could only draw inferences about what was on the films. The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained.

Id. at 657, 100 S.Ct. at 2402 (footnotes omitted). *See also United States v. Haes*, 551 F.2d 767, 771 (8th Cir. 1977).

In this case, the Federal Express employees removed the plastic bags from the tube, but did not re-

---

[3] Justice Stevens wrote the opinion for the Court, joined by Justice Stewart. Justice White wrote a concurring opinion which Justice Brennan endorsed. Justice Marshall concurred in the judgment.

move or in any way analyze any of the powder; they subsequently replaced the bags back in the tube. The DEA agents removed the bags, took several samples of the powder, and subjected the samples to tests in order to determine their composition.

The private search in this case exposed bags of powder, but the Jacobsens' initial reasonable expectation that the package's contents would remain private was not entirely frustrated by the private search. In *Walter*, Justice Stevens wrote:

> The fact that the cartons were unexpectedly opened by a third party before the shipment was delivered to its intended consignee does not alter the consignor's legitimate expectation of privacy. The private search merely frustrated that expectation in part. It did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection.

Id. at 658-59, 100 S.Ct. at 2402-03 (footnotes omitted).

The DEA agents' extension of the private search precisely parallels that in *Walter*. In both cases, viewing the objects with unaided vision produced only an inference of criminal activity. In both cases, government agents went beyond the scope of the private search by using mechanical or chemical means to discover the hidden nature of the objects. The governmental activity represents a significant extension of the private searches because it revealed the content of the films in *Walter* and, here, the composition of the powder. In the absence of exigent circumstances, which the government does not allege, we hold the agents were required to obtain a warrant authorizing the taking of samples and analysis thereof.[4]

---

[4] In almost identical circumstances, a panel of the Sixth Circuit, in *United States v. Barry*, 673 F.2d 912 at 920 (6th Cir. 1982) held that a warrant is not required to conduct chemical analysis of a sample of a seized substance. *See also People v.*

In this case, the government does not assert and we do not perceive any circumstances justifying the agents' failure to obtain a warrant authorizing examination of the contents of the package. *Cf. United States v. Ross*, ___ U.S. ___, 102 S.Ct. 2157, 72 L.Ed.2d ___ (1982) (automobile exception). As the Supreme Court stated in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d (1971):

> The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. If is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.

Adler, 50 N.Y.2d 730, 431 N.Y. S.2d 419, 409 N.E.2d 888, *cert. denied*, 449 U.S. 1014, 101 S.Ct. 573, 66 L.Ed.2d 473 (1980); *cf. United States v. Andrews*, 618 F.2d 646 (10th Cir.), *cert. denied*, 449 U.S. 824, 101 S.Ct. 84, 66 L.Ed.2d (1980) (upholding without discussion search involving sampling and testing following more limited private search). The court in *Barry* attempts to distinguish *Walter* on the grounds that the films were protected by the first amendment and that the chemical test was not as significant an investigation as the viewing of a film. *Id.* 673 F.2d at 920. We disagree with this analysis. *Walter* rested on the fourth amendment, not the first amendment. The invasion of privacy and collection of inculpatory evidence involved in testing unidentified substances is parallel to the investigation and intrusion involved in screening a film. In *Adler*, the New York Court of Appeals dismissed the chemical analysis on the grounds that the content of the substance was already evident and the substance was legally in the possession of the police. This reasoning allows a finding of probable cause to eliminate the warrant requirement of the fourth amendment contrary to established principles of fourth amendment jurisprudence.

Id. at 481, 91 S.Ct. at 2045 (footnote omitted). *See also Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978). We find that the agents' removal of the plastic bags, the taking of samples, and the chemical analysis of these samples constituted a violation of defendants' fourth amendment rights.

The fruits of this illegal search should have been suppressed. The finding of cocaine in a package being sent to the Jacobsens' home was the core of the affidavit which justified the issuance of the warrant to search the Jacobsens' home. The only other allegation contained in the affidavit is that Bradley Jacobsen is "mentioned in at least two investigative files for cocaine distribution." Without the statement that a test indicated the presence of cocaine in the powder, the affidavit does not provide probable cause to believe the Jacobsens possessed cocaine in their home. The search produced traces of cocaine, drug paraphernalia, and remnants of burned tape which matched that used to wrap the package. This evidence was improperly admitted. On this basis, we reverse the defendants' convictions on the drug related counts.

Bradley Jacobsen also appeals from his conviction for assaulting a federal officer, arguing the evidence was insufficient to support the verdict. He alleges he did not have the requisite specific intent to assault the officer. Viewing the evidence in the light most supportive of the verdict, we find reasonable minds could have concluded without a reasonable doubt that Bradley Jacobsen intended to assault the federal officer. *Cf. United States v. Manelli*, 667 F.2d 695 (8th Cir. 1981).

We reverse both defendants' convictions for possession with intent to distribute cocaine and conspiracy to distribute cocaine. We affirm Bradley Jacobsen's conviction for assault on a federal officer.

WILLIAM H. BECKER, Senior District Judge, concurring specially.

I concur in the opinion in this case, with serious reservations for the reasons stated in the dissenting opinion by Justice Blackmun of the Supreme Court of the United States in *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), because I believe it is more than possible that the rule enunciated in that opinion will become the majority rule in the future. The federal law in the field of unreasonable and therefore unconstitutional searches and seizures is being reexamined by the Supreme Court of the United States in a movement toward reexamination and restriction of the outer limits of the exclusionary rule. See *United States v. Ross*, ___ U.S. ___, 102, S.Ct. 2157, 72 L.Ed.2d ___ (1982). Even the author of the plurality opinion in *Walter v. United States*, *supra*, acknowledged in Part V of *United States v. Ross*, *supra*, that: "Nevertheless, the doctrine of *stare decisis* ..." does not preclude a change in the law governing warrantless searches. Because the result of the majority opinion follows an interpretation of the current law in this field of constitutional law in this Court and of the current opinions of the Supreme Court of the United States, I concur with the reservations expressed above.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term

No. 81-2158

UNITED STATES OF AMERICA, APPELLEE,

v.

BRADLEY THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN, APPELLANTS.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross, Arnold and John R. Gibson would grant petition for rehearing en banc.

October 14, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 81-2158

Filed July 27, 1982

UNITED STATES OF AMERICA, APPELLEE,

v.

BRADLEY THOMAS JACOBSEN, APPELLANT.

JUDGMENT

This appeal from the United States District Court for the District of Minnesota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the conviction for possession with intent to distribute cocaine and conspiracy to distribute cocaine be, and it is hereby, reversed in accordance with the opinion of this Court.

It is further ordered that the conviction for assault on a federal officer be, and it is hereby, affirmed in accordance with the opinion of this court.

July 27, 1982

A True Copy:

ATTEST: /s/ ROBERT D. ST. VRAIN

Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CRIM. 4-81-53

RECEIVED JUL 23, 1981

UNITED STATES OF AMERICA, PLAINTIFF,

v.

BRAD THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN, DEFENDANTS

ORDER

John M. Lee, Acting United States Attorney, and Janice M. Symchych, Assistant United States Attorney, 234 U.S. Courthouse, Minneapolis, MN 55401, for plaintiff.

Mark W. Peterson, Friedberg & Peterson, Suite 100 Marquette Building, 400 Marquette Avenue, Minneapolis, MN 55401, for defendant Donna Marie Jacobsen.

Earl P. Gray, 1805 American National Bank Building, St. Paul, MN 55101, for defendant Brad Thomas Jacobsen.

This matter is before the Court on the objections of the defendants to the report and recommendation of the United States Magistrate dated June 24, 1981. Based on this Court's independent de novo determination of the Magistrate's report, findings and recommendations, the objections will be overruled.

The facts are fully set forth in the Magistrate's report and need not be repeated here. The Court finds it unnecessary to undertake a thorough analysis of the defendant's objection to the Magistrate's finding that the gray tube was in plain view in the box because the Court believes that this fact is immaterial to the legal

issue presented here. Therefore the Court will assume, without deciding, that the newspaper in the box covered the gray tube and that neither the gray tube nor the contraband could be seen when the box was turned over to the Drug Enforcement Agency (DEA) agents.

The issue raised by the defendants here is whether the DEA agents needed a search warrant to look into the box and perform a field test of the powder when they arrived at the Federal Express office. The defendants concede that the initial search of the package and discovery of the cocaine by the Federal Express employees was not proscribed by the fourth amendment because it was done by private persons and not by the federal officers. The defendants also concede that the cocaine was seized by the Federal Express employees when Mr. Stegemoller put the box containing the cocaine into a locker in his office. The defendants concede that the DEA agents lawfully obtained custody of the box containing the cocaine because the seizure was done by private persons. However, the defendants assert that after the agents obtained custody of the box, they were required to obtain a search warrant before examining the contents.

The defendants rely upon *United States v. Roberts*, 644 F.2d 683 (8th Cir. 1980), *cert. denied*, 101 S.Ct. 79 (1980) (en banc) and *Walter v. United States*, 447 U.S. 649 (1980). Neither case supports the defendants position. In *Roberts*, the defendant had leased two storage units from the same company at two separate locations, one in Independence, Missouri, and the other in Gladstone, Missouri. On one evening, employees at both locations notified the general manager of the storage company that they had discovered several unlocked units at each location. The general manager went to the Gladstone location to investigate. One of the unlocked units belonged to the defendant. When the general manager entered this unit to investigate, he discovered

a large bag of marijuana. When he left this storage facility, he secured the door by bolting an exterior door. This was a routine procedure designed to protect the property rather than to prevent the lessee from gaining access to the storage locker. The general manager then went to the Independence location. He again looked through the unlocked storage units. In the unit belonging to the defendant, he observed several boxes of what appeared to be marijuana. This time, the general manager had guards posted over the premises and notified the police. Within a short time, the police arrived at the Independence location and took possession of the material. The next day the police went to the Gladstone location and seized the large bag of marijuana.

The *Roberts* court held that the drugs stored at the Independence facility had been seized by private persons before the arrival of the officers, and that therefore the district court erred in suppressing the evidence based on that seizure. However, the court ruled that the large bag of marijuana at the Gladstone facility had not been seized by private persons, and therefore the warrantless seizure by the police was improper. The defendants here argue that the *Roberts* holding that a warrant was required before the police could seize the large bag of marijuana indicates that a search warrant was required of the DEA agents here before examining the seized box. However, the facts of this case are nearly identical to the occurrences at the Independence location in *Roberts*. The defendants overlook the fact that no search warrant was required of the police officers when they took possession of the seized boxes at the Independence location. Although the Eighth Circuit did not discuss the issue, it apparently agreed with the two other circuits that have held that when a private person makes an initial search of a closed container and then turns the container over to government authorities, the reopening of the container does not constitute

a separate search requiring a warrant. *See United States v. Bulgier*, 618 F.2d 472 (7th Cir.), *cert. denied*, 101 S.Ct. 125 (1980); *United States v. Blanton*, 479 F.2d 327 (5th Cir. 1973).

In addition, the Supreme Court has agreed that no warrant is required in such situations. In *Walter v. United States*, 447 U.S. 649 (1980), the case upon which the defendants seek to rely, Justice Stevens, in the plurality opinion, stated: "In these cases there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties." *Id.* at 656. In this case, the Federal Express employees had already opened the box and removed the bags containing the white powder from the gray tube. The only investigation of the contents of the box beyond the investigation by Federal Express employees was the field test by the DEA agents. Thus, the defendants' contention is that when federal agents lawfully receive possession of a substance they believe to be contraband, they must obtain a search warrant before a field test to verify the chemical content of the contraband may be performed. This contention is without foundation. *Cf., United States v. Andrews*, 618 F.2d 646 (10th Cir.), *cert. denied*, 101 S.Ct. 84 (1980), (held that white powder, which was discovered by private person and then field tested by office without a warrant, was admissible).

Accordingly, IT IS ORDERED that the defendants' objections to the report and recommendation are overruled, the report and recommendation as supplemented herein is adopted, and the defendants' Motion to Suppress is denied.

/s/ HARRY H. MACLAUGHLIN

JUDGE HARRY H. MACLAUGHLIN
United States District Court

DATED: July 22, 1981

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Criminal No. 4-81-53

Filed January 4, 1982

UNITED STATES OF AMERICA, PLAINTIFF,

v.

BRAD THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN, DEFENDANTS.

REPORT AND RECOMMENDATION

A hearing was held in the above-entitled action before the undersigned United States Magistrate on May 21, 1981 on the defendants' Motion to Suppress. Defendant Brad Jacobsen was present in court with his counsel, Earl Gray, Esquire. Defendant Donna Jacobsen was present in court with her counsel, Mark Peterson, Esquire. The government was represented by United States Attorney John M. Lee.

Defendants are charged in a three count indictment. Count I charges them jointly with the unlawful possession of cocaine with intent to distribute in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2. Count II charges only defendant Brad Thomas Jacobsen with willfully assaulting, resisting and interfering with a special agent of the Drug Enforcement Administration while he was engaged in the performance of his official duties in violation of Title 18, United States Code, Sections 111 and 1114. Count III charges the defendants jointly with conspiring to violate Title 21, United States Code, Section 841, that being to distribute cocaine in violation of Title 21, United States Code, Section 846.

FINDINGS OF FACT

Daniel Stegemoller, the City Manager of the Federal Express Office at the Minneapolis-St. Paul International Airport, arrived in his office for work between 7:00 and 7:30 a.m. on May 1, 1981. Between 7:30 and 8:30 a.m. Ed Childers, a supervisor for Federal Express, called Mr. Stegemoller into his office and showed him a wrapped package on his desk which had been damaged and torn by a fork on a forklift. Stegemoller instructed Childers to open the package in order to examine its contents for possible damage. This was done pursuant to company policy set forth in a policy and procedures manual, page 14 of which was received in evidence as Defendant's Exhibit #3. The procedures manual states in part:

> "**OPENING A PACKAGE**—We can open a package for inspection if:
>
> A. There is visible damage or suspected damages.
>
> B. There are no markings or insufficient markings to identify the package.
>
> C. Any time the station manager has reasonable cause to believe the shipment may be dangerous or of such a nature that carriage aboard an FEC aircraft would violate a statute or federal regulation."

Damaged packages are opened and inspected because of the possibility of insurance claims.

The package consisted of a cardboard box wrapped in brown paper. Inside the box was newspaper and a tube wrapped with gray tape; the tube was about 10 inches long. Inside the tube was a series of four plastic bags, one inside the other; the innermost bag contained a white powder. Because Stegemoller thought the white powder might be an illegal substance, he called the Federal Express Central Regional Security Manager, Edgar J. Davis, in Chicago; the call was made pursuant

to company procedure. After Stegemoller reported that he had found a suspicious white powder during a routine examination of a damaged package, Mr. Davis instructed Stegemoller to notify the Drug Enforcement Administration. If suspected illegal drugs are discovered at an airport it is the policy of Federal Express to notify the DEA because Federal Express has no authority to confiscate illegal drugs.

At about 9:00 a.m. Ed Childers called Special Agent James Lewis of the DEA and reported the incident to him. Agent Lewis called Agent Jerry Kramer and asked him to pick up Agent Jacobson and meet him at the airport.

Mr. Stegemoller put the plastic bags containing the white powder back in the tube, laid the tube in the top of the box and then carried the box to his office and put it in a locker. The tube was in plain view in the box and the bags with the white powder were visible from the end of the tube.

Agent Kramer arrived at the Federal Express office first. Mr. Stegemoller gave him the opened box and it was put on a desk. Agent Kramer pulled the bags containing the white powder from the tube; he field tested the white powder and it tested positive for cocaine. When Agent Lewis arrived he removed another small sample of the white powder from the bag for further testing. The agents gave Mr. Stegemoller a receipt for the package and then took it to the airport DEA office.

The package, which was addressed to D. Jacobs, 7300 West 130th St., Apple Valley, MN was rewrapped by the agents with new brown paper; this was necessary because the original wrap was too extensively damaged to be used again. The purpose of re-wrapping the package was so that the agents could make a controlled delivery of the package to the defendants.

Based upon the above information, which was set forth in an affidavit of Special Agent David Haight, a

search warrant was obtained for the single family dwelling of the defendants, which is the same address as that of the consignee on the package. The search warrant was received in evidence as Government Exhibit #1.

At approximately 2:45 p.m. on May 1, 1981, Agent Lewis went to defendants' residence with the package. When defendant Donna Jacobsen answered the door, Agent Lewis told her he had a package to deliver. Mrs. Jacobsen signed for the package and Agent Lewis left it with her. Agent Lewis drove to the house in an unmarked van owned by the State of Minnesota; he was dressed in blue pants, shirt and jacket.

Agent Lewis returned to the residence of the defendants approximately one hour later with eight to ten other law enforcement officers, some of them in uniform. Four officers took positions around the house and Agent Lewis went to the front door with about four or five officers behind him. Agent Lewis knocked on the door a few times and defendant Brad Jacobsen opened the door (there was no screen door). Agent Lewis stated that when he had delivered the package earlier, Mrs. Jacobsen had signed the wrong weigh bill; he then extended his hands with a weigh bill in his left hand covering his credential holder and badge which were in his right hand. Agent Lewis next removed the weigh bill from over his credentials and badge and said "police". Defendant Brad Jacobsen slammed the door into Agent Lewis's face, breaking his glasses and knocking him off the front door stoop.

Agent Lewis heard defendant Brad Jacobsen yell "It's the police—flush it" and then heard footsteps running up the stairs; he and the other officers yelled "police—open up" twice. When there was no response, and after about five to ten seconds, the officers kicked the door open and entered the house. As the officers

entered the house and as they searched each room they yelled "police".

The agents executed the search warrant and seized a number of items, including suspected illegal substances. The defendants were arrested.

There is no evidence of any working relationship between Federal Express and the government. The cocaine in the package was discovered through the exercise of routine company procedures by Mr. Stegemoller and Mr. Childers.

MEMORANDUM

There were no statements or confessions made by either defendant to law enforcement officers. Agent Lewis testified at the hearing that after defendant Brad Jacobsen slammed the door shut he heard him yell "It's the police—flush it", but an unsolicited exclamation such as that is not of the kind contemplated by *Miranda* v. *Arizona*, 348 U.S. 436 (1966).

The search and seizure conducted at the defendants' residence on May 1, 1981 was conducted pursuant to a search warrant signed by United States Magistrate J. Earl Cudd. The search warrant was for "a split entry, single family dwelling, brown in color with an attached garage bearing the address of 7300 on the residence. Also bearing the number of 7300 on the mailbox at the address of 7300 West 130th Street, Apple, Valley, MN." The search warrant described the property which was suspected as being concealed at that address as "four ounces of cocaine together with the package used to transport it, as well as other drugs, drug sales profits, and investment and any other records pertaining to previous drug shipments and co-conspirators."

The property which was seized in the course of executing the search warrant, and which is described in the return thereto, is as follows:

1. Traces of white powder found by J. Lewis in master bedroom.

2. One cardboard box found by D. Haight on bed in master bedroom.

3. Fifty-nine white capsules found by R. Romcik in drawer—hall bathroom.

4. One wood box cont. three plastic bags of p.m. and also paraphenalia found by D. Haight in basement safe.

5. Four yellow tablets in plastic bags cont. in false bottom can found by T. Olby in bath, master bedroom.

6. One Eastern A.L. receipt found by D. Haight in basement.

7. Misc. papers.

8. One pink capsule; one blue tablet; white powder traces in container found by J. Lewis in hall bath.

9. Two address books found by J. Lewis—kitchen.

10. Charred tape found by J. Lewis in basement fireplace.

11. Misc. papers—found by J. Lewis in office.

12. Water from MBR restroom—Olby—has white powder in it.

I have already found that the examination of the damaged package and its contents by employees of Federal Express was done in their private capacity, without any prior knowledge or instigation by the government.

The defendants rely heavily on *United States* v. *Roberts*, 644 F.2d 683 (8th Cir. 1980) where the trial court had suppressed two separate seizures of marijuana from two separate "Stor-All" rental units. The Court of Appeals reversed the suppression on one of the seizures which was nearly on all fours with the seizure in the instant case. In *Roberts*, employees of Stor-All had looked into two unlocked rental units, at two different

locations, and discovered what they thought was marijuana.

The Court in *Roberts*, at p. 686, framed the issue to be resolved in a case such as this as follows:

> "Where a search and an ultimate seizure are initiated and largely carried out by private persons, but where law enforcement officers get involved in the overall process and ultimately take over the material seized, this court has held that a court in determining whether there has been a violation of the fourth amendment must consider: (1) official involvement in the initial search, and (2) official involvement in the effective seizure of the item or items in question. *United States* v. *Haes*, 551 F.2d 767, 770 (8th Cir. 1977); *cf. United States* v. *Entringer*, 532 F.2d 634 (8th Cir.), *cert. denied*, 429 U.S. 820, 97 S.Ct. 67, 50 L.Ed.2d 81 (1976)."

In reversing the suppression of the evidence seized from one of the Stor-All units the Court held at p. 688:

> "A different situation is presented as to Count I. When Stor-All agents found some 900 pounds of a substance that appeared to be marijuana stored in the Independence facility, they immediately mounted guard over the premises and notified the police. Officers appeared on the scene promptly and took possession of the material in question which turned out to be marijuana. The work of the officers with respect to the seizure at Independence was not completed until the small hours of November 30, 1978 which may tend to explain why the Gladstone facility was not immediately visited by the officers.
>
> Had a claimant of the material stored at Independence undertaken to take possession of the material between the time it was discovered by private persons and the time of the arrival of the officers, it is unreasonable to think that he would have been allowed to pick up, destroy, or take away the contraband.

> We conclude, therefore, that the drug stored at Independence had been seized privately before the arrival of the officers, and that the district court erred in suppressing evidence based on that seizure.
>
> Accordingly, we reverse the district court as to Count I while affirming as to Count II. The case is remanded for further appropriate proceedings."

In the instant case Mr. Stegemoller of Federal Express clearly seized the evidence here when he stuffed the plastic bags of cocaine back into the tube, laid the tube in the box, and put the box into a locker in his office. As stated in the above quote, it is unreasonable to believe that at this point the defendants would have been allowed to pick up, destroy, or take away the contraband.

In *United States* v. *Wedelstedt*, 589 F.2d 339 (8th Cir. 1978), cited in defendant's memorandum, the Court found no government involvement in a seizure made by a private employee, stating at p. 346:

> "... However, there is no evidence that any federal or state agent 'directed, authorized or knew' of the seizure by Meade. *United States* v. *Luciow*, 518 F.2d 298, 300 (8th Cir. 1975). In *Luciow*, the informer made an allegedly illegal entry and search. The defendant sought to suppress the evidence obtained, but the court found no violation of the fourth amendment: 'Before * * * action can be attributed to the government, some degree of government instigation of the illegal entry must be shown.' *Id.*
>
> Here, there was no evidence that the seizure was conducted 'with government knowledge and consent, tacit or explicit * * *.' *United States* v. *Mekjian*, 505 F.2d 1320, 1328 (5th Cir. 1975). The district court's detailed findings of nongovernmental involvement are not clearly erroneous. Absent governmental involvement, there is no error in the admission of the exhibit. *Id.* at 1327. See

also *Gunlach* v. *Janing*, 536 F.2d 754, 755 (8th Cir. 1976)."

The defendants' memorandum also cites *United States* v. *Warinner*, 607 F.2d 210 (8th Cir. 1979). The facts of that case are so dissimilar from the facts in the instant case that it is of little or no help in resolving the issue pending before the Court.

The defendants rely heavily on *Walter* v. *United States*, 447 U.S. 649 (1980), a case which is clearly distinguishable on its facts. In that case a private carrier erroneously delivered 12 large, securely sealed packages containing 871 boxes of allegedly obscene film to the wrong company. Employees of that company opened the packages and then examined the 871 boxes contained in the packages and discovered that on one side there were suggestive drawings, and on the other there were explicit descriptions of the contents. One employee opened one or two boxes and attempted without success to view one or two of the films, by holding them up to a light. Shortly thereafter they called an F.B.I. agent who picked up the packages. Subsequent to picking up the film the F.B.I. agents viewed it with a projector, some as late as two months after they had taken possession of it. It should be noted that there was no majority opinion in *Walter;* Justice Stevens wrote the opinion and was joined by Justice Stewart; Justice White filed an opinion concurring in part and was joined by Justice Brennan; Justice Marshall concurred in the judgment; and Justice Blackmun filed a dissenting opinion which was joined in by Justices Powell and Rehnquist and Chief Justice Burger. The Court stated in *Walter* at pages 656-657:

> "... It has, of course, been settled since *Burdeau* v. *McDowell*, 256 U.S. 465, that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has ac-

quired lawfully. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487-490. In these cases there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties . . .

If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy. Even though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's re-examination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. In these cases, the private party had not actually viewed the films . . ."

It should also be noted that the courts have treated the seizure of film or books differently from other seizures because of the additional protection afforded by the First Amendment; see *Walter*, *supra* at p. 655. In *United States* v. *Roberts*, *supra*, at p. 687 the Court stated:

"Citing *Roaden* v. *Kentucky*, 431 U.S. 496, 501-06, 93 S.Ct. 2796, 2799, 2802, 37 L.Ed.2d 757, this court held that where first amendment materials are involved, there must be a closer adherence to the fourth amendment than in cases involving such things as contraband or weapons. *United States* v. *Kelly*, *supra*, 529 F.2d at 1373. And the court concluded that on the record before it, there was enough government involvement to entitle the defendant to the protection of the amendment . . .

As to the distinction drawn in *Kelly* between a case involving the first amendment and a case not involving that amendment, we think that it should be said, first, that the marijuana involved here can

hardly be said to have been entitled to any first amendment protection.

Second, the police involvement in this case overall was not comparable in either quality or persistence to the official involvement present in the *Kelly* case."

United States v. *Kelly*, 529 F.2d 1365 (8th Cir. 1976), referred to in the quote above, was cited in defendants' memorandum; that case involved a seizure of books and is distinguishable from the facts in the instant case. The Court in *Kelly* said at pages 1372-1373.

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. (Case cited) Because of the nature of the property seized in the instant case, however, the seizure cannot be justified on the basis of the plain view exception. 'A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.' *Roaden* v. *Kentucky*, 413 U.S. 496, 501-03, 93 S.Ct. 2796, 2800, 37 L.Ed.2d 757 (1973). The Fourth Amendment should be read in conjunction with the First Amendment, rather than 'in a vacuum.' *Id.* the proper seizure of books and magazines, which are presumptively protected by the First Amendment demands a greater adherence to the Fourth Amendment warrant requirement. (Cases cited) As the Supreme Court stated in *Roaden* v. *Kentucky*, *supra:*

> The seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards.

413 U.S. at 502, 93 S.Ct. at 2800 (citations omitted). Consequently, in the absence of exigent

circumstances in which police must act immediately to preserve evidence of the crime, we deem the warrantless seizure of materials protected by the First Amendment to be unreasonable. (Case cited)

Such a seizure without a warrant is unreasonable not because it would be easier to obtain a warrant but because prior restraint of the right to expression demands a more strict evaluation of reasonableness. *See Roaden* v. *Kentucky*, *supra*, 413 U.S. at 504, 93 S.Ct. 2796. For example, in *Marcus* v. *Search Warrant*, 367 U.S. 717, 732, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961), and *Lee Art Theatre* v. *Virginia*, 392 U.S. 636, 637, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968), the Supreme Court held that a warrant for the seizure of allegedly obscene material could not be issued on the mere conclusionary opinion of a police officer that the material sought to be seized was obscene. In the absence of exigent circumstances, therefore, seizure of First Amendment materials should observe traditional constitutional safeguards and allow a judge to focus searchingly on the question of obscenity ... It is clear that exigent circumstances may make it reasonable to permit police action without prior judicial evaluation. *Roaden* v. *Kentucky*, *supra*, 413 U.S. at 505, 93 S.Ct. 2796. We, however, are not aware of the existence of any exigent circumstances in the instant case. The FBI had ample opportunity to obtain a valid warrant based on the affidavit of Mr. Spitznagel or Agent McDermott prior to the seizure of any books or magazines. This is not a case involving contraband or objects dangerous in themselves."

The Supreme Court said in *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973), in finding a seizure of film unreasonable:

"... The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of

expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression."

United States v. *Benson*, 631 F.2d 1336 (8th Cir. 1980) which is cited by defendants in their memorandum is distinguishable on its facts. There, a closed leather tote bag sitting in the back seat of a vehicle was searched, although the defendant was seated in the front seat of the vehicle. The defendants also cited *United States* v. *Chadwick*, 433 U.S. 1 (1977) which is distinguishable because there the officers searched a double locked footlocker which was in the trunk of the car in which the defendant was a passenger. And *Arkansas* v. *Sanders*, 442 U.S. 753 (1979) which is cited by defendants, is distinguishable because there the officers searched an unlocked but closed suitcase which was in the trunk of the taxi in which the defendant was riding.

The defendants cite *United States* v. *Haes*, 551 F.2d 767 (1977), which is distinguishable for the same reasons as I discussed for *Walter* v. *United States*, *supra*. In *Haes* the officers obtained movie film from a private carrier and reviewed it on a projector, even though employees of the carrier had not done so.

For cases sustaining a search and seizure by government agents after a search by a private employee, see *United States* v. *Entringer*, 532 F.2d 634 (8th Cir. 1976), *cert. denied*, 429 U.S. 820 (1977); *United States* v. *Pryba*, 163 U.S. App. D.C. 389, 502 F.2d 391, 401 (2d Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975); *Gold* v. *United States*, 378 F.2d 588, 590 (9th Cir. 1967).

In *United States* v. *Wright*, 641 F.2d 602 (8th Cir. 1981), cited in defendants' memorandum, officers who

were executing a search warrant for controlled substances seized a shotgun which was received in evidence. In discussing the plain view exception to the search warrant requirement the Court said at pages 605-606:

> "The first requirement, that of lawful initial intrusion, was satisfied here because the officers were acting pursuant to a valid state search warrant authorizing them to search for controlled substances in appellant's motel unit. See, e.g. *United States* v. *Johnson*, 541 F.2d 1311, 1316 (8th Cir. 1976) (per curiam) (search warrant); *United States* v. *Clark*, *supra*, 531 F.2d at 932 (search warrant).
>
> The second requirement, that of inadvertent discovery, was also met. Although the officers probably expected to find a firearm in view of ATF's information about appellant's purchase of a firearm and falsification of the federal transaction record, and in fact might have been able to obtain a search warrant for a firearm, there is no indication in the record that the search warrant for controlled substances was obtained in bad faith or that it was used as an excuse to seize the firearm in plain view and thus evade the warrant requirement. See, e.g., *United States* v. *Cutts*, 533 F.2d 1083, 1084 (8th Cir. 1976) (per curiam); *United States* v. *Carwell*, 491 F.2d 1334, 1336 (8th Cir.) (per curiam), *cert. denied*, 417 U.S. 949, 94 S.Ct. 3076, 41 L.Ed.2d 669 (1974); *cf. United States* v. *Hare*, 589 F.2d 1291, 1293-96 (6th Cir. 1979) (discussion of meaning of 'inadvertence' in Coolidge). 'We have previously held lawful the warrantless seizure of weapons or contraband during the course of an otherwise authorized search, not withstanding that the discovery was anticipated and that a warrant could have been obtained.' *United States* v. *Cutts*, *supra*, 535 F.2d at 1084 (citations omitted)."

Defendants cite *Unsited States* v. *Lester*, ____ F.2d ____, Slip Op. 80-2129 (8th Cir. May 14, 1981) in their

memorandum. In that case the Court sustained the seizure of defendant's bloodstained pants and boots three hours after he had been placed in custody for detoxification. The defendant was a murder suspect and witnesses had earlier told officers that the defendant had been drinking with the deceased and that they had observed blood on his pants and boots. The Court stated at pages 5-6:

> "Probable cause to arrest appellant arose when the officers observed the blood and hair on Lester's pants and boots, having recently been informed of his possible participation in the assault upon Owen Wise Spirit. In essence, appellant's bloodstained clothing was within the plain view of the arresting officers.
>
> It is well established that evidence falling within the plain view of an officer properly in a position to perceive the view is subject to seizure and admissible as evidence. *United States* v. *Johnson*, 541 F.2d 1311, 1316 (8th Cir. 1976). Evidence is within the plain view rule where the initial intrusion resulting in the 'plain view' is lawful, discovery of the evidence is 'inadvertent,' and the incriminating nature of the evidence is 'immediately apparent.' *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 466.
>
> These requirements were clearly satisfied in the present case. The initial entry preceding the arrest falls within the consent exception to the search warrant requirement. Discovery of the blood on appellant's clothing, which was obvious and open, was inadvertent. And the incriminating nature of the bloodstains on the clothing of one suspected of committing an assault was obvious.
>
> These circumstances do not give rise to the inference that the arrest was effected for the purpose of creating an excuse to search. Nor can it be inferred that the officers used the detoxification charge as a pretext to further their quest for evidence relating

to the murder. *Klingler* v. *United States*, 409 F.2d 299, 304-05 (8th Cir.) *cert. denied*, 396 U.S. 859 (1969) (vagrancy arrest). Rather, it appears that the seizure of the evidence in this case, already in plain view of the arresting and custodial officers, was merely a normal incident to a custodial arrest."

Defendants cite *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) in their memorandum; that case is distinguishable on its facts. There the police searched a murder suspect's house and car two weeks after a murder. The defendant was in his home when arrested, and his car, which was in his driveway, was towed in by the police two hours after the arrest. Although the state attorney general was in charge of the investigation, he signed a search warrant as an acting justice of the peace. The Court held that the search warrant was not issued by a neutral and detached magistrate. The state then tried to justify the search of the car because it had been "in plain view" in the driveway. In holding that the search of the car was illegal the Court said at p. 471-472:

"... The initial intrusion may, of course, be legitimate not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects—*not contraband nor stolen nor dangerous in themselves*—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

In the light of what has been said, it is apparent that the 'plain view' exception cannot justify the police seizure of the Pontiac car in this case. The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize

it when they came upon Collidge's property. *And this is not a case involving contraband or stolen goods or objects dangerous in themselves.*" (Emphasis added.)

United States v. *Johnson*, 637 F.2d 532 (8th Cir. 1980), cited by defendants, is distinguishable on its facts. *Johnson* involved a "Terry" search of the defendant and a search of the defendant's duffle bag, which was sitting a few feet away, due to exigent circumstances.

The examination of the package at the airport was not an illegal search and seizure and the motions to suppress should not be granted on that ground. Because of this determination, the subsequent search of the home of the defendants need not be suppressed because of any taint or poison fruit under *Wong Son* v. *United States*, 371 U.S. 471 (1963). The affidavit in support of the search warrant was not based upon evidence obtained as a result of a prior unlawful, warrantless search.

The defendants have not made a general attack on the adequacy of the affidavit upon which the search warrant is based; but even if they had, the affidavit on its face clearly shows probable cause for the issuance of the warrant.

Lastly, the defendants attack the manner in which the search warrant was executed, relying on an alleged violation by the officers of Title 18, United States Code, Section 3109 which states as follows:

> "§ 3109. Breaking doors or windows for entry or exit
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

After Agent Lewis identified himself to defendnat Brad Jacobsen, Jacobsen slammed the door into his face, breaking his glasses and knocking him off the door stoop. A number of officers started yelling "Police—open up." Agent Lewis heard footsteps running up the steps and heard Brad Jacobsen yell "it's the police—flush it." Even though the officers did not say that they were executing a search warrant, and neither Mr. nor Mrs. Jacobsen were heard to orally refuse admittance, I find that there was no violation of 18 U.S.C. § 3109.

Ker v. *California*, 374 U.S. 23 (1963), involved a probable cause arrest without a warrant by state officers, and a search incidental thereto, at the defendants' apartment. In an opinion by Justice Brennan, concurring in part with the opinion of Justice Clark, it is stated at p. 47:

> "Even if probable cause for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), a. then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted."

Subsequently, in *Sabbath* v. *United States*, 391 U.S. 585, 591 n.8 (1968), the Court said it recognized that there were exceptions which allowed an entry without a warrant and said there was little reason why such exceptions should not apply to Section 3109.:

> "Exceptions to any possible constitutional rule relating to announcement and entry have been rec-

ognized, see *Ker* v. *California*, *supra*, at 47 (opinion of Brennan, J.) and there is little reason why those limited exceptions might not also apply to § 3109, since they existed at common law, of which the statute is a codification. See generally *Blakey*, n.5, *supra*.

The Court in *United States* v. *Smith*, 520 F.2d 74, 171 U.S. App. D.C. 342 (1975), cited by the defendants in their memorandum, remanded the case because there had not been a finding by the trial court as to a refusal of admittance; the case is distinguishable on its facts. However the Court stated at p. 78:

> "We think it follows from two decisions of this court involving a particular search and seizure that the absence of a finding of refusal is fatal to the validity of a search and seizure, unless exisgent circumstances dispensed with the need therefor, a matter to be separately discussed in Part IV, *infra*."

The Court went on to state at p. 80:

> "The testimony respecting the forced entry calls for some further consideration in light of the reference in the cases to exigent circumstnaces. We have noted that the stipulation states that it was only after the officers heard "hurried movement" from within the apartment, a stirring and sort of shuffling, which one officer considered to be movement away from the door, was resort had to the sledge hammer. This testimony not only bears on whether there was a refusal of admittance; it also suggests the possibility that exigent circumstances might be found to have dispensed with the need for full compliance with the terms of section 3109. The denial of the motion to suppress did not rest upon this theory, however, and, therefore, cannot be sustained by reason of it in the absence of a finding and conclusions in that regard. The District Court nevertheless is not precluded from considering the possibility on the remand ... In the second *Masi-*

ello case, however, our own court, though not relieving the trial court of the necessity of findings and conclusions, on its review of those made by the District Court after the remand stated:

> 'Where, as here, after giving the required notice the officers hear sounds which indicate to them that the evidence sought by the warrant may be in process of destruction, exceution of the warrant need not be deferred long enough to allow completion of the process.'"

Defendant cites *United States* v. *Mendoza*, 433 F.2d 89 (sic 891), (5th Cir. 1970), *cert. denied*, 401 U.S. 843. The facts of that case are dissimilar and not controlling here. However, the Court in Mendoza did say at p. 895:

> "An alleged violation of 18 U.S.C. § 3109 must be judged in light of the particular circumstances surrounding the execution of the warrant. *Jones* v. *United States*, 1960, 362 U.S. 257, 272, 80 S.Ct. 725, 4 L.Ed. 2d 697."

The case of *United States* v. *Murrie*, 534 F.2d 695 (6th Cir. 1976) is of no help. That opinion turned on an erroneous application of the burden of proof where the defendant had testified that there was a sudden and unannounced breaking which made out a *prima facie* case of a no knock violation. The case was remanded for a further consideration of the motion to suppress by the trial court.

In *United States* v. *Boyer*, 574 F.2d 951, 954 (8th Cir. 1978) the Court said:

> "Nor is Boyer assisted by reference to the principles of 18 U.S.C. § 3109. In *Miller, supra*, 357 U.S. at 310, 78 S.Ct. at 1196, the Supreme Court recognized that if the officers are justified 'in being virtually certain that the *petitioner* already knows their purpose so that an announcement would be a useless gesture' (our emphasis), the requirement that the officers state their purpose might be relaxed. This was strengthened in *Sabbath, supra*,

391 U.S. at 591 n.8, 88 S.Ct. at 1759, where the Court approved the limited exceptions contained in Justice 374 U.S. 23, 47 [83 S.Ct. 1623, 1636, 10 L.Ed.2d 726] (1963). Those exceptions include, 'where the persons within already know of the officers' authority and purpose."

The same Court said in *United States* v. *Kulscar*, 586 F.2d 1283, 1286 (8th Cir. 1978):

> "While the agents knocked and announced 'police' repeatedly before forcing both the front door and the door to Kulcsar's apartment, they failed to state expressly that they were there to arrest him. However, our recent decision in *United States* v. *Boyer*, 574 F.2d 951 (8th Cir. 1978) establishes that announcement of purpose is excused when it would be a useless or futile gesture. If 'the persons within already know of the officers' authority and purpose' or 'if the officers are justified 'in being virtually certain that the petitioner already knows their purpose." announcement of purpose is unnecessary. *Id* at 954, *citing Ker* v. *California*, 374 U.S. 23, 47, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963); *Miller* v. *United States*, 357 U.S. 301, 310, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958). Thus, "[t]he exceptions to the announcement of purpose by arresting officers depend on the officers' knowledge and belief." *United States* v. *Boyer*, *supra*, 574 F.2d at 954. The district court determined that the agents were certain Kulcsar knew their purpose. This finding was not clearly erroneous."

I find that the defendants knew of the authority and purpose of the officers and that exigent circumstances existed for entry without any further attempt by the officers to literally comply with 18 U.S.C. § 3109. Defendant Brad Jacobsen had already slammed the door into the face of Agent Lewis and yelled "it's the police—flush it." It would be hard to imagine a more explicit acknowledgement by a defendant of his knowledge of the purpose for the presence of law

enforcement officers. The defendants' Motion to Suppress should be denied.

/s/ _____

FLOYD E. BOLINE
UNITED STATES MAGISTRATE

DATED: JUNE 24, 1981

(THIS PAGE INTENTIONALLY LEFT BLANK)